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In the Supreme Court of the United States

October Term, 1932.

No. 517.

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, Jr., individually and as a Commissioner of said Public Service Commission of Wisconsin, et al., etc.,

Appellants,

vs.

WISCONSIN TELEPHONE COMPANY,

Appellee.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF OF APPELLEE.

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WISCONSIN TELEPHONE COMPANY,

Appellee.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF OF APPELLEE.

STATEMENT OF JURISDICTION.

It is not controverted that the appeal comes within Section 266 of the Judicial Code as amended. Statements required by paragraph 1 of Rule 12 have been filed. Simultaneously, a motion to affirm was filed by the appellee. This court has noted probable jurisdiction and has postponed further consideration of the motion to affirm to the hearing of the case on the merits (53 S. C. 224, ... U. S. .....).

STATEMENT OF THE CASE.

This is an appeal from a decree for an interlocutory injunction entered by a statutory court of three judges sitting in the Western District of Wisconsin. The injunction restrained the appellants, until the final hearing and determination of this suit, from enforcing a certain order issued by the appellant Commission under date of June 30, 1932, which order is described below* (R. 629, 632). The appellee is a telephone company operating a telephone system in the State of Wisconsin (and to a negligible extent in the states of Illinois and Minnesota, which operation is not here material) (R. 2, 261). It operates 96 exchanges in separate communities throughout the state connected by a system of toll lines (R. 358).

* For convenience, we refer to this hereinafter as "the Commission's Order."

A.

Proceedings prior to Commission's Order.

On or about July 29, 1931, the appellant Commission instituted a proceeding for a state-wide investigation on its own motion of appellee's rates, rules, services, practices and activities (R. 262). As part of this investigation by

the Commission, a series of hearings was commenced on April 1, 1932, in which the Commission introduced into evidence some testimony and exhibits from its accountants and engineers referring to a portion of appellee's business and some testimony of other persons stated to be economists and statisticians. On June 3, 1932, at the date of the last of said hearings held prior to the issue of the Commission's Order, it was understood that the said investigations and hearings would continue for more than a year thereafter (R. 4, 264, 466). Appellee had had no opportunity to present any evidence or to bring the real facts to the attention of the Commission, excepting cross examination of part of the Commission's witnesses and that subject to limitation by the Commission, and had had no opportunity to present argument on the law or the facts involved in the proceeding, other than argument as to the admissibility of certain of the Commission's evidence (R. 4). The Commission's Order was issued on June 30, 1932, without notice to appellee of the intention or contemplation of the appellant Commission to issue any temporary, emergency or interlocutory order in the proceedings or that such subject matter had received any consideration (R. 393).

B.

Summary of Commission's Order.

The Order is printed in the record in full as Exhibit B to the complaint (R. 38 to 212). It was issued in the course of a "state-wide proceeding" which was initiated by the Commission in 1931 through an order which is printed in the record as Exhibit A to the complaint (R. 17 to 37). That order rests on a statement of belief that "the state-wide basis for telephone rate-making is the sound and fair one" (R. 36), and it covers all services, toll as well as exchange.

The Commission's Order, the enforcement of which is enjoined, provides, however, for a level reduction of 12½% of all rates for exchange telephone service, with minor exceptions relating to some classes little used (R. 205). While making arbitrary allocation of property and expenses to toll service which show on the Commission's own figures a return of approximately 1% per annum on toll service (R. 137, 139, 145), it provides for no change in toll rates (R. 205, 189). The appellee operates ninety-six exchanges, the rates for which were established prior to June 30, 1932, in each exchange by separate proceedings before said Commission under its former name of "Railroad Commission" (R. 358 to 365). By providing a single level reduction of the returns in these ninety-six exchanges, the defendant Commission in its Order ignored the fact that the exchanges are related and may be considered a part of a state-wide system only by virtue of their interconnection through the toll system (R. 255).

The reduction of rates provided by the Commission's Order, if it had been in effect in 1931 (which is the period on whose earnings the Order is based) according to the calculations contained in the Order itself, would have reduced the appellee's revenues by $1,566,449.64 (R. 148). The total net operating income of the appellee for 1931, including its exchange service and toll service, according to its books, as found by the Commission in its said Order, was $2,891,481 and its net operating income on the same basis from exchange service was $2,331,571 (R. 56). The reduction provided in said Order, if it had been effective in 1931, would have reduced appellee's total net income by 54% and would have reduced its exchange net income (which is the service for which rates were ordered reduced) by 67%. The Commission, however, restated appellee's book net operating income for 1931 as $4,060,478 (R. 139) by so-

called adjustments, arbitrarily reducing the deduction for certain items of expenditure and the depreciation charge, which adjustments appellee contests. On this net income as adjusted by the Commission, the reduction ordered, if in effect in 1931, would have reduced appellee's net operating income by 38%.

The reduction ordered was not based upon a finding that appellee was earning more than a fair rate of return upon the fair value of its property used and useful in its telephone service or in any part of its telephone service. *The Commission expressly declined to make a finding as to any fair value (prudent investment, reproduction value or otherwise) of said property or of what would be a fair rate of return thereon* (R. 143, 189). In lieu of such findings, the Commission was content to find that the rates, in addition to taking care of the comparatively minor interest and preferred stock obligations, would produce 6% on the *par value of a part of appellee's common stock,* with some margin—less than 6% on the proportion of the surplus allocable thereto (R. 189). The part of the stock thus arbitrarily selected as the basis for determining whether or not there was a fair rate of return was that which the Commission allocated to appellee's *local* service (R. 144 to 146).

Appellee's rates are divided into two principal classes, those covering various types of service within an exchange, called exchange rates, and those covering toll service (R. 13, 255). The toll rates are designed to afford compensation for furnishing toll service from a toll switchboard in one exchange to a toll switchboard in another, commonly called "the board to board basis" (R. 255), and are "upon the theory that the toll message rate should carry the cost from toll switchboard to toll switchboard" (Commission's Order U-3049; R. 367). The exchange rates are designed to provide compensation for exchange service in-

cluding both *local service,* i. e., service between two subscriber stations in the same exchange, and also *toll terminal service,* i. e., transmittal of toll calls between subscriber station and the toll switchboard or vice versa (R. 255, 367, 368). These rates, with immaterial exceptions, and this method of designing rates, were adopted with the express approval of the Commission under its former name of Railroad Commission of Wisconsin (R. 277, 278, 255, 359 to 390, 537, 538, 543). This method of designing rates is that commonly used throughout the United States in the telephone business (R. 12, 578 to 584).

In the Commission's Order here in question, the Commission purported to allocate to *"local" service* (using that designation (R. 126, et seq.)) a portion of the company's operating expenses, making certain adjustments therein, and the proportion of the company's capital stock which it determined was proportional to its property utilized for local service, and then proceeded to fix the rates for *exchange* service based on these computations of the alleged cost of *local* service. In doing so, the Commission purported to apply the doctrine of this court in *Smith vs. Ill. Bell Tel. Co.,* 282 U. S. 133. However, in its process the Commission segregated and eliminated from its computation of capitalization and cost of *local* service all the expense and capitalization attributable to the *toll terminal* service, but it made no segregation or allocation of *exchange* revenues n o t attributable to *local* service; and it thereupon proceeded to reduce the rates for *exchange* service on the basis of making the entire *exchange* rates only sufficient to meet its computation of expenses and capital stock allocated to *local* service alone. This left no compensation whatever for the *toll terminal* service, although the company was still required to furnish it under its *exchange* rates in whose definition no change had been made. Likewise, no provision was made for any

addition to the toll rates to cover this terminal toll service, although on the face of the Commission's Order the toll rates themselves appear as not compensatory and to be so low as to be confiscatory (See R. 56, 139, 145). The Commission's Order omits any computation of a return on toll property and the Commission in its answer denies knowledge of the results of toll operation (R. 275), although that, as well as exchange operation, is covered by its proceedings, and the existence of the toll service as a connecting link is the only justification for treating the 96 separate exchanges as a single unit.

Before making the allocation of local expenses above referred to, the Commission reduced five items of the appellee's expenses for 1931 (R. 122) so as to raise appellee's total net operating income for 1931 from $2,891,481, as claimed by appellee, to $4,060,478 (R. 141). These adjustments, like all of the remainder of the Commission's Order, were made without notice or hearing thereon (R. 393). The appellee has contested and contests each of said adjustments, except one insignificant one (R. 230, 231, 253, 249). On the basis of the above mentioned reduction of expenses, and the above mentioned subdivision of exchange service with the consequent allocation of property and expense to toll service while neglecting to assign the corresponding revenues to toll service, the Commission ordered the reduction in rates hereinbefore set fourth of 12½% on all exchange revenues. It determined that the operating net income from 1931, if reduced in accordance with the Commission's Order, would have provided the appellee a return of slightly over 6% on the *par value* of the portion of its capital stock allocated by the Commission to what the Commission itself designated as "the *local* portion of exchange property" after paying the operating expenses of "the *local* business," although the revenue dealt with was

that of all *exchange* operations, *local and toll terminal* (R. 189).

The Commission found that the provision for 6% on the par value of all of appellee's common stock (after allowing for dividends on preferred stock and interest) would require $2,971,894 (R. 144). The Commission's own estimate of the loss in revenue provided in said Order is $1,566,449.64 (R. 148) and deducting this from appellee's total revenue for 1931 (after making the Commission's controverted adjustment of expenses) which is computed by the Commission at $4,060,478 (R. 139), would leave $2,494,028.

The Commission's Order (R. 144) shows that $571,894 is required for annual charges for interest and preferred stock dividend. Deducting this from the $2,494,028 would leave $1,922,134 available for return on the common stock, adopting the Commission's own basis and after making all of the Commission's adjustments. This is a return of 4.85% on the appellee's $40,000,0000 of common stock. However, if there be added to this, the surplus of $8,727,779 as stated in the Commission's Order (R. 199), we find that the return allowed by the Commission on stock equity, namely: common stock and surplus, is 3.95%.

The Commission found that the requirement of return for toll service in 1931 was $809,544 (R. 145) on its basis of calculating return at 6% of the par value of common stock. Although making no change in appellee's toll rates, the Commission's allocation of expenses from exchange service to toll service, even after reducing said expenses, was calculated by the Commission to result in a return to the appellee of $248,251 (R. 139) against this requirement of $809,544. This type of service was thus provided by the Commission's Order with less than one-third of the amount required to produce 6% on the par value of the common stock.

The amounts above stated are based on 1931 earnings. In the said Order the Commission found that the revenues of the appellee were declining and that its earnings for 1932 would probably be less than 1931 (R. 150).

Although purporting in the said Order to be applying the doctrine of segregation stated in *Smith vs. Illinois Bell Telephone Co.*, 282 U. S. 133 (R. 124), the Commission's Order contains no finding regarding the portion of appellee's exchange or toll operations in interstate commerce as distinguished from intrastate commerce and in fact the said Commission in its answer has disclaimed knowledge of these facts (R. 269, 271).

It is notable that not only does the Commission's Order not attempt any valuation of the appellee's property, but also it nowhere in its 162 pages shows any balance sheet of the appellee.

C.

Proceedings subsequent to the issue of the Commission's Order.

Statutory Application for Rehearing.

On July 19, 1932, the appellee made application to the Commission for rehearing of the matters determined in the said Order (R. 265). The said application was in conformity with Section 196.405 of Wisconsin Statutes and contained the grounds on which the appellee claimed and maintained the said Order to be unlawful and unreasonable and is set forth in full in the record as Exhibit C to the complaint (R. 213 to 240). The motion for rehearing sets forth substantially the same matters alleged in the bill

of complaint and states the fair value of the property, the lack of a reasonable return and the confiscatory character of the Order as well as the other violations of the Constitution therein. Argument in connection with the said application for rehearing was held before the Commission on July 25, 1932, and the said application was denied on the same day. An order of the Commission denying the rehearing, being Exhibit X to the answer, is set forth in full in the record (R. 283 to 287).

Summary of Complaint.

Appellee filed its bill of complaint herein (R. 1 to 17) on July 28, 1932, in which it prayed that the rates prescribed in the Commission's Order be decreed to be in violation of the Constitution of the United States and the Constitution and Statutes of the State of Wisconsin and that the said Order be decreed to be void; that the appellants be restrained perpetually and during the pendency of this suit from any attempt to compel the observance or enforcement of said Order or from enforcing penalties or other remedies for failure to comply with the said Order. The complaint alleges that the Commission's Order deprives the appellee of property without due process of law and denies to the appellee the equal protection of the laws in violation of the Fourteenth Amendment; and it contains *inter alia* allegations setting forth, respectively: appellee's average investment in 1931 and 1932 in its exchange plants and equipment, in all its telephone plants and equipment, in exchange plants and equipment allocable to intrastate exchange service, and in all its telephone plants and equipment allocable to all intrastate telephone service, each with and without including working capital, stores and supplies and going value; the fair value of such property respectively; the revenues produced by appellee's existing rates

in 1931 and 1932 respectively for each of such subdivisions of the services; the corresponding revenues which would have been produced in 1931 and the first five months of 1932, respectively, on the Commission's reduction of rates; that the greatest rate of return on any of said valuations of appellee's property used and useful respectively for any class of service had been less than 4½% per annum in either of said periods, and would be reduced to less than 2.3% per annum under the reduction of the rates ordered by the Commission's Order; that 8% per annum was a reasonable return; that the Commission's Order was illegal on its face, aside from its other illegalities, in eliminating from appellee's exchange rates all provision for meeting operating expenses and return on property on terminal toll service, while continuing to require such service and making no provision for compensation therefor in any other rates or in any other way, and also in allowing appellee less than the legal rate of interest in Wisconsin on its investment in its property used and useful in rendering telephone service, and according to the computation of the Commission itself in reducing the return of appellee to less than 4 1/3% on the net assets represented by its common stock on the basis of its 1931 business and to a smaller amount on the basis of its 1932 business; that the appellee's rates were less than reasonable and just rates and that, under the statutes of Wisconsin, the Commission had no authority to prescribe lower rates; that the finding that "an emergency exists" within the meaning of Section 196.70 upon which said Order was based was erroneous; and that the said Order was made without notice or hearing; that the said Order was void because the proceeding before the said Commission had been without due process of law in respects more completely set forth in the said complaint (R. 13 and 14); that the appellee was without any adequate

remedy at law and subject to irreparable injury because: unless restrained, the defendants (appellants) would enforce the rates prescribed by the Commission's Order; the number of appellee's subscribers was more than 265,000 and if the new rates were made effective for even a limited period and thereafter the Commission's Order should be held void, appellee would be unable to recover from many subscribers the difference between said rates and its lawful rates, and further this would involve multiplicity of suits; and failure to apply the new rates, in the absence of an injunction, would result also in a multiplicity of suits; if the appellee were compelled to make effective the new rates, even for a limited period, the appellee's property would be confiscated and its expenses for accounting and collection would be greatly increased and its service disrupted.

Application for Injunction and Issue of Temporary Restraining Order.

The appellee filed affidavits with its complaint, in support of the allegations contained therein (R. 246 to 256). After proceedings duly had on notice, a temporary restraining order was entered on July 30, 1932, (R. 256 to 258), together with a bond in the amount of $100,000 providing for the repayment to subscribers of any amounts collected in excess of those which might ultimately be held to be legally collectible. Notice of the application for interlocutory injunction was duly served on the defendants and the Governor and the Attorney General of the State of Wisconsin (R. 259 to 261, 288).

Answer.

Appellants filed their answer on August 26, 1932 (R. 261 to 283), in which many of the allegations of the com-

plaint were denied on information and belief, including the allegations as to investment and fair value of property (R. 268, 270). Appellants denied knowledge of some allegations of the complaint, including those having to do with the segregation of intrastate property and operating income and the reasonableness of the toll rates (R. 269, 271).

Proof by Affidavit.

Thereafter and prior to the hearing on the interlocutory injunction, affidavits were filed and served by the appellee (R. 289 to 427, and 500 to 603) and by the appellants (R. 427 to 499 and 603 to 627). The appellee's affidavits corroborated the complaint, and in addition to the figures for the year 1931, showed the result of operation under the present rates and the proposed rates for the first six months of 1932, the latest period for which results were obtainable. The appellee's affidavits showed that whether based on investment or fair value and whether considered with reference to the entire telephone service, the entire exchange service, entire local service or the entire intrastate telephone service, intrastate exchange service or intrastate local service, the proposed rates would have yielded under 2.3% on any basis for the year 1931 and under 2% per annum on any basis for the first six months of 1932.

The appellee's affidavits showed the study made to determine the proportion of intrastate business, and set forth fully the methods and details of its valuation for each classification of the property, including the method of computing reproduction value new and the determination of the actual physical condition of the property based on knowledge and field inspection of it. The appellants' affidavits, like its answer, make no attempt at valuation of the

portion of the property devoted to intra-state service, and merely state generally the reproduction value of the entire property and the reproduction value "of the portion of exchange property devoted to local use," with deduction therefrom of an arbitrary portion of the appellee's depreciation reserve. The affidavits of both parties go extensively into the questions of adjustment of operating expenses and depreciation charges and other elements in the case, and the appellee presented certified copies of the previous orders of the Commission fixing the scope of exchange and toll rates.

A tabulation of the valuations and rates of return shown by the appellee and also a discussion of the valuation (showing in full the appellee's methods) and of the items of revenue and expense, including the appellants' adjustments, is set forth in the appellee's brief presented to the District Court, a copy of which is attached to the Appellee's Motion to Affirm heretofore filed with this court, to which we refer.

Interlocutory Injunction.

On September 21, 1932, the application for an interlocutory injunction was heard before a specially constituted court of three judges and after argument the court granted the injunction and required a bond of $1,000,000, conditioned *inter alia* upon the repayment to subscribers of amounts which might be collected in excess of those ultimately found to be legally collectible (R. 628 to 632).

The decree for interlocutory injunction contains a finding that an interlocutory injunction should issue because the rates prescribed by the Order of the appellant Commission would result in the confiscation of the property of the appellee and would deprive appellee of property with-

out due process of law and that irreparable injury to appellee would result unless an interlocutory injunction should issue (R. 629, 630).

SUMMARY OF ARGUMENT.

I. The essential question is whether the lower court properly exercised or abused its discretion in issuing the injunction.

Under the rule laid down in *Ohio Oil Co. vs. Conway*, 279 U. S. 813 (814) and *Ohio Bell Telephone Co. vs. Public Utilities Commission*, 3 F. (2d) 701 (704), the injunction was not only proper but was required on the basis of the undisputed facts before the court. In addition, the disputed facts before the court, particularly the state of the issue on confiscation and the prima facie case made by the appellee, required an injunction.

The injunction preserved the *status quo* pending ascertainment of the facts by evidence; and the injunction was required not only by the balance of convenience but also by the irreparable damage which would otherwise be caused to the appellee, coupled with the fact that the appellants and the public could be completely protected by giving of a bond; and the denial of the injunction would have been an abuse of discretion.

II. Resolving all theories in favor of the appellants and accepting the Commission's method of determining a "fair" rate of return as 6% on the par value of *part* of appellee's stock, the existence of a surplus which was 22% of the par value mathematically demonstrates a return of less than 6% on the stock equity assigned to said part of the business. On the face of the Order, taking the whole of

appellee's stock there was a return of less than 5% on the par value and less than 4% on the stock equity. Admittedly, and on the Commission's own computations, the appellee was deprived by the Order of all return on the terminal toll service which it was required to maintain. The Commission's method of basing a "fair" rate of return on par value of stock is at least a strikingly new departure from established legal foundations. This theory may be considered on its merits by the trial court later, but it justified maintenance of the *status quo* pending consideration.

III. Points relied on by the appellants.

A. Findings of fact and conclusions of law are required by Equity Rule 70½ only in "deciding suits in equity." The granting of an interlocutory injunction under bond is not a decision of the suit. The making of tentative or provisional findings based on affidavits preliminary to hearing on the facts would be a "barbarism." Such findings would be difficult to make, and would embarrass later proceedings. Decisions of state courts under statutory provisions similar to the Rule are opposed to the propriety of findings for interlocutory injunctions. The cases cited by the appellants do not show the necessity of such findings. The court, however, did find in its decree that there would be a confiscation and a deprivation of property without due process of law and also that irreparable damage to the appellee would occur if an injunction were refused. The statute (U. S. C. Title 28 §383) governing the matter was strictly complied with.

B. There was no abuse of discretion by the court below and no lack of sufficient hearing or deliberation to determine conclusively that on the undisputed facts the injunction was required and also that the disputed facts were

sufficient to require the injunction. It was not the trial court's duty to determine definitively the very points of fair value and return on which the Commission disclaimed any finding in its Order. The lack of notice or hearing by the Commission preliminary to its Order indicated a lack of due process. Application for modification of the Order was made to the Commission and denied. The injunction was not "permanent in effect."

C. The objection that the trial court failed to make a reservation permitting a permanent order by the Commission at some future date has no force because the injunction does not cover anything except the rates prescribed by the Commission's Order, which by their terms, expire in one year; and the injunction does not attempt to deal with rates subsequent to these.

D. The appellants assert that the court abused its discretion in holding that the rates prescribed were confiscatory. This argument is inconsistent with the assertion that the court should have made and failed to make findings. The confiscatory nature of the rates prescribed is discussed in this brief under Sections II, IV A and IV B.

IV. While it is true that the merits of the case are not now to be adjudicated in this court, some view of the merits, as they existed on the record before the trial court, is necessary to determine whether or not judicial discretion was exercised. They show the discretion was duly exercised and not abused.

A. The appellee's affidavits showed a rate of return of less than 4½% on each relevant classification of property with an exhaustive exposition of the methods applied to obtain valuations, apportionments and rates of return.

The appellants took issue with some of these valuations but denied all knowledge on the important and material classifications having to do with intrastate business.

B. The Commission failed to find any valuation on property or fair rate of return thereon and in lieu thereof offered a finding as to a fair rate of return on the par value of a part of the common stock. No authorities were presented in the Order or to the court in support of this departure from recognized methods.

C. The appellee operates under a single state-wide franchise in ninety-six communities which are interconnected and related only by its toll system. A uniform and level reduction of rates for all exchanges without any attention to the toll system presented a disregard of the unitary basis. Moreover, there was an admitted basing of exchange rates on capital stock and expenses allocated to local service only, without any compensation for the terminal toll service included in the exchange rates.

D. The obvious lack of due process of law in the conduct of the Commission's proceedings included *inter alia:* the complete lack of any notice of the proposed issue of the Commission's Order or even of the fact that such an order was under consideration; the lack of opportunity to the appellee to present its case or have a hearing on the case presented by the Commission as protagonist.

E. The designation of the Order as "temporary" and "emergency" does not remove appellee's constitutional guaranties. There was in fact and obviously no "emergency."

F. The expenses of appellee which were eliminated by the Commission in determining net income were of such amount that, if their elimination was improper, the Commission's Order would be unfounded under its own method of computation.

Conclusion.

Irrespective of the fact that the affidavits showed practically conclusively confiscation of the appellee's property based on a fair valuation thereof, the undisputed fact that appellee would be subject to irreparable loss, should the injunction not be issued and the Order ultimately be held invalid, coupled with the fact that the appellants and the telephone subscribers would be protected by bond against any loss, together with the at least probable violations of constitutional guaranties by the Commission's Order, presented a situation to the trial court where the interlocutory injunction was absolutely required as granted.

ARGUMENT.

I.

The Essential Question Is Whether the Interlocutory Injunction Was a Proper Exercise of Judicial Discretion. The Injunction Was Not Only Proper But It Was Required on the Record Before the Lower Court, and Denial Would Have Been an Abuse of Discretion.

This appeal is primarily concerned with whether the lower court abused its discretion in issuing the interlocutory injunction. The essential test as to whether there was

an abuse is not the number of hours which the court required for hearing or an examination into the intellectual celerity of the three individual judges who reached an unanimous conclusion, but whether or not, upon the record before the court, there is sufficient to warrant a conclusion that the trial court did not issue the injunction upon reasonable or legal grounds or as a result of an exercise of permissible judicial discretion. Unless it can be shown that the trial court could not have reached the conclusion it did by the exercise of reason and discretion, the decree must be affirmed.

Chicago Great Western Railway Company vs. Kendall, 266 U. S. 94 (100).

Prendergast vs. New York Telephone Company, 262 U. S. 43 (50).

Smith vs. Illinois Bell Telephone Company, 269 U. S. 531.

We submit that, upon the undisputed facts before the court, the obvious "balance of convenience," "balance of injury," the unquestionable irreparable damage, and the facts that were patent upon the face of the Commission's Order, sound judicial discretion could have been exercised only by granting the injunction. The facts and the law, which inevitably lead to this conclusion, are hereinafter discussed, together with the points raised by appellants in their brief. Wherever the merits of the case are adverted to, we limit ourselves to the record before the trial court and the facts which were known to the trial court, solely for the purpose of making inquiry as to whether on such facts, it can be said that the issue of an injunction was an abuse of discretion, and mindful of the admonitions of this court that the merits of the case are not now to be here tried.

The rule of law which governed the granting of an injunction of this kind is too well settled to require extended discussion. It is stated in *Ohio Oil Company vs. Conway*, 279 U. S. 813, as follows:

> [279 U. S. 814] "* * * But enough appears to make it plain that there is a real dispute over material questions of fact which can not be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined.
>
> "* * * Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, Topeka & Santa Fe R. Co.*, 185 Fed. 321, 331-332."

The decisions are referred to and the rule stated in *Indiana General Service Co. vs. McCardle*, 1 F. Supp. 113, where the court held:

> [1 F. Supp. 115] "This is not a final hearing, but only upon petition of plaintiff for an interlocutory injunction, and therefore proof need not be as complete as upon a final hearing. All that is necessary is that plaintiff show that it is prima facie entitled to an injunction; that the injury to plaintiff will be certain and irreparable if the application for an interlocutory injunction be denied, and, if the injunction be granted, that the injury to the opposing party, even if the final decree be in its favor, may be adequately indemnified by bond."

In *Prendergast vs. New York Telephone Co.*, 262 U. S. 43, 51, it was pointed out that "Especially will the granting of the temporary writ [of injunction] be upheld, when the *balance of injury* as between the parties favors its issue" (Italics ours).

Similarly in *Chicago Great Western Ry. vs. Kendall*, 266 U. S. 94, 100, this court said: "It would take a very clear case upon the record to justify this court in setting aside the conclusion of a court of three judges under §266 upon what is solely a question of fact and an exercise of sound judicial discretion as to the just *balance of convenience* * * *" (Italics ours).

To the same effect are:

Ohio Bell Telephone Co. vs. Public Utilities Commission, 3 F. (2d) 701, (704).

Love vs. A. T. & S. F. Ry. Co., 185 Fed. 321, 331.

In addition to the constitutional questions patent in the Commission's Order itself, it was obvious and admitted that there was a conflict between the parties on the questions of valuation, rate of return and actual amounts being earned. It was not and could not be controverted that the appellee's affidavits, as well as its complaint, presented a clear case of confiscation. The mere presence of these important issues of fact that were apparent in the affidavits which here occupy 338 pages of the printed record, was sufficient in itself to warrant an injunction under the rule above quoted. *(Ohio Oil Company vs. Conway*, 279 U. S. 813.)

The "balance of injury" and the "balance of convenience" are also patent. The appellee has over 265,000 (R. 15, 281) subscribers receiving monthly bills averaging about $5. If required to reduce its charges by one-eighth and such reduction were ultimately found to be illegal, recovery would be an impossible task and damage to the appellee would be certainly irreparable to a great extent. The

subscribers could be protected by bond in such fashion that, if the rate reduction were ultimately held valid, refunds could be made. Exchange telephone subscribers are not of the transient and unidentified type, as may be the case with railroad passengers or other groups of the public at large. The "injury" and "convenience" were more than a matter of "balance." They were preponderantly such as to require an injunction.

II.

On the Theories Most Favorable to the Appellants and on Appellants' Own Figures, the Order Would Have Resulted in a Return of Less Than 6% on the Common Stock Equity of the Appellee Allocated by the Commission to Its Local Service and on Less Than 4% on Its Entire Common Stock Equity; and Confiscation Was Further Shown on the Face of the Commission's Order Itself.

For the sake of argument, we pass for the instant the appellee's proof of fair value and confiscation and turn to the Commission's own basis of a return on common stock or common stock equity. The term "common stock equity" is used by the Commission (R. 172) to comprehend the par value of the appellee's common stock plus its surplus account; and we so use it here.

The Commission in its Order determined the fair rate of return from exchange rates to be 6% of the *par value* of that part of the appellee's common stock which is assigned by the Commission to local service (R. 144, 145). In so doing it made no provision for a return on that portion of the company's surplus which on any theory should be allocated with the common stock making together the common stock equity. The surplus amounted to approximately 22% of the common stock and is shown in the Commission's Order (R. 199).

In computing the reduction of exchange rates, the Commission allowed a margin of $288,000 over the 6% return on the par value of the common stock allocated to local service which margin the Commission called "excess revenue" (R. 150). The Commission in its Order pointed out that the revenues of the appellee were declining in 1932 and then assigned this so-called excess of $288,000 to offset the effect of such decline (R. 150).

When the Commission's neglect to provide for a return on surplus was challenged in the complaint here, the Commission in its answer pointed to the same $288,000 and alleged that it was also available as a return on surplus and followed this theory into its affidavits (R. 466) and into its brief here (Appellants' Brief p. 19). In arguing that this $288,000 was available as a return on surplus and that the earnings in 1931, if the rate reduction had been in effect, would have been 6.04% on the "common stock equity (par value of stock plus surplus)," the fact is overlooked that the Commission in its Order, itself assigned this amount to offset the decline in revenues in 1932 (R. 150) and reiterated this in denying a rehearing (R. 287). On the face of the Order, if the rate of return is cut down to 6% on the par value of common stock, the existence of a substantial surplus conclusively demonstrates that the rate of return on common stock equity is less than 6%.

The appellants speak of the 6% return on common stock as if all of the common stock were being dealt with. However, the computation has reference only to a part of the common stock—that allocated by the Commission to local service. On the face of the Commission's Order, and on the Commission's own theory the effect on the appellee's entire telephone business of the Commission's reduction of rates is to bring the return on all its common stock to less than 5% and the return on its common stock equity to

less than 4% (see *supra* p. 8). The unconstitutionality is patent.

Brooks-Scanlon Co. vs. Railroad Comm., 251 U. S. 396, (399).

Further, the Commission's allocation of appellee's common stock to exchange service was based only on property allocated by it to "local service" and eliminated the exchange property used in furnishing terminal toll service. The Commission apparently wished to treat this property as allocated to toll service; but in its allocation the Commission allocates to toll only the property and expenses of the toll terminal service and omits to allocate to toll the revenues received for terminal toll service under the classification of exchange rates. In this operation, the Commission purported to be following the rule of this court stated in *Smith vs. Illinois Bell Telephone Co.*, 282 U. S. 133 (R. 124). Aside from the fact that that case dealt with allocation between intrastate and interstate business (not as applied here to an allocation between local and toll business, the great majority of which is intrastate [282 U. S. 148 to 151]), that case referred to "the separation of the intrastate and interstate property, *revenues* and expenses of the Company" (Italics ours) (282 U. S. 148). The omission of the allocation of revenues is obviously a misapplication of the rule.

Admittedly this transfer resulted in depriving the appellee of any return to meet the expenses or a return on the property involved in furnishing terminal toll service (R. 274). This is an unquestionable violation of the appellee's constitutional rights.

Banton vs. Belt Line Ry. Corp., 268 U. S. 413, 421.

The appellants dispose of this in their answer herein by a statement that application can be made to the Commission for an increase in toll rates. A willingness to permit an application for remedy for a deprivation which the Commission is imposing in the very Order in question is not a remedy which a federal court will recognize as an answer to a claim for confiscation. In *Monroe Gaslight & Fuel Co. vs. Michigan P. U. Comm.*, 292 F. 139, a statutory three-judge court said:

> [292 F. 145] "If a preliminary injunction otherwise should issue, we cannot rightfully deny it just because the Commission announces that, if this rate shall finally be found noncompensatory, it will permit the loss to be amortized through a later rate. This policy is thoroughly fair, and is to be commended; but this Commission is under no legal duty to take that course, and its intentions or its personnel may change. When the court sees a case of week by week and month by month continuance of confiscation, even if each monthly loss is small, the plaintiff is entitled to his injunction without waiting for possible future relief, unless for reasons not here present. See Pendergast vs. New York Telephone Co. and Oklahoma Co. vs. Commission, supra."

In the case at bar the monthly loss would not be small as in the *Monroe* case, but involved about $125,000 per month and about 54% of appellee's total net income for 1931 (*supra* p. 4). The loss of revenue was immediate and the possible remedy distant and very doubtful. The appellee presented this point to the Commission as a ground for rehearing (R. 224), but this was denied.

Moreover, the court had before it the fact that the Commission had disclaimed making any finding as to the fair

value of appellee's property or of a fair return thereon (R. 143, 189). Without, at this point, entering a discussion of the merits of the Commission's theory of basing the return upon capital stock while refraining from finding the value of the property used in the service, it need not be argued to this court that the theory is at least strikingly and sensationally new and represents a departure from every established legal foundation. The merits may be considered by the trial court when the case is heard and argued on the merits, but the point is here urged that the appearance of a rate reduction based on a theory so entirely unprecedented and contrary to all adjudicated bases for rate making, very properly gave the lower court pause and required a granting of an interlocutory injunction, pending the exploration of the question.

In *St. Louis & O'Fallon Ry. Co. vs. United States,* 279 U. S. 461, this court said:

> [279 U. S. 467] "In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority—'The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction.'"

In fact the trial court might well have granted a permanent injunction on the pleadings in view of this situation, as the statutory three-judge court did in *Oklahoma Gas & Electric Co. vs. Corporation Commission* and *Southwestern Light & Power Co. vs. Corporation Commission* (U. S. D. C. Western District of Oklahoma, November 2,

1 F Sup 966

1932; U. S. Daily of December 2, 1932, p. 4). There the court said:

[1 F Sup 969] "If the Commission does not have the power to reduce rates of one fuel to meet the costs of another fuel, the order is invalid. If the principle upon which an order is based is erroneous, or beyond the power of the Commission, the order cannot stand, and the case must go back to the Commission for an order made upon a lawful basis.

C. M. & St. P. Ry. Co. vs. P. U. Comm., 274 U. S. 344.

Northern Pac. vs. Dept. Public Works, 268 U. S. 39.

St. Louis and O'Fallon Ry Co. vs. U. S., 279 U. S. 461, 465.

* * *

[1 F Sup 970] "The Commission has made no findings upon the underlying question of the value of the properties devoted to this service, nor to the revenues and disbursements incident thereto. We cannot. As was said in Florida vs. U. S., 282 U. S. 194, 215:

" 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.' "

If the omission to make findings warranted judgment on the pleadings, it certainly warranted an interlocutory injunction.

Irrespective of the many other grounds as to which judicial discretion required an interlocutory injunction, the fact that the Order on its face granted less than 6% return on common stock equity, that it eliminated all compensation for terminal toll service, and finally, that it disclaimed any finding on value was sufficient to compel the granting of the injunction without further inquiry.

III.

Discussion of Points Relied on by Appellants.

A.

Findings of fact and conclusions of law are not required or proper on an interlocutory injunction merely maintaining the status quo and are not prescribed by Equity Rule 70 1/2.

Appellants urge that the failure to make findings of fact and conclusions of law is a violation of Equity Rule 70½ and that the decree should be reversed for that reason. They claim to be in ignorance of the grounds for issuing the injunction.

Although the complaint alleged violations of various provisions of the Constitution of the United States and the Constitution of the State of Wisconsin and of state statutes, the trial court rested its decree on confiscation *and so found.* The following is quoted from the decree:

> [R. 629] "* * * and said motion having been argued by counsel and the court finding that an interlocutory injunction should issue because the rates for telephone service prescribed by the order of the de-

> fendant Public Service Commission dated June 30, 1932, described in the complaint and hereinafter referred to, would result in the confiscation of the property of said complainant devoted to telephone service and that the compulsion of the maintenance of said rates would deprive the complainant of property without compensation and without due process of law, in violation of the Constitution of the United States, and that irreparable injury to complainant will result unless an interlocutory injunction issue as prayed by the complainant."

This complied strictly with the statute governing the contents of injunctional decrees.

U. S. C. Title 28, § 383 (printed in appendix).

However, Equity Rule 70½ by its terms is applicable in "*deciding suits in equity.*" The entering of a decree for an interlocutory injunction does not constitute the act of deciding a suit in equity. There may be cases where an interlocutory order may finally decide and dispose of some issues in the case. Whether or not the rule is applicable to such an order need not be considered here. The decree for temporary injunction here merely preserved the *status quo* pending determination of the facts on which findings could be based.

We do not maintain, as counsel seem to believe (Appellants' Brief p. 8) that the rule does not apply to appeals from decisions of three-judge courts. We maintain that it does not apply to interlocutory injunctions, under the circumstances here presented, in any court.

The question suggests itself, if findings are to be made on an interlocutory injunction, how comprehensive are those findings to be? Unless they are to be a mere statement of the ultimate conclusions of fact as in the interlocutory decree

in the case at bar, obviously the findings would cover all the facts in issue, namely: the value of the property; the gross revenue and the expenses, including specifically the Commission's disputed adjustments of expenses for maintenance, license contract, pension fund and depreciation; the amount of net income; the allocation of property, revenue and expenses between interstate and intrastate service; the basis of exchange and toll rates as established by the company's practice and the Commission's orders; the division of exchange revenue, expenses and property as between local and terminal toll service; the unity of the appellee's telephone system; the amount of a reasonable return; the facts as to the existence of an emergency, lack of notice and opportunity for hearing, and the Commission's alleged improper procedure; and the conclusions of law would cover all the legal issues raised by these facts. To make such full determination preliminarily on affidavits would obviously tend strongly to prejudice the final complete determination on full hearing and it might prove particularly embarrassing in event of a change in the personnel of the statutory court on final hearing from that on the application for interlocutory injunction. The preparation of such findings likewise would entail an entirely unjustifiable labor on the trial court.

As was well said by the Circuit Court of Appeals for the Second Circuit in *Elliott Addressing Machine Co. et al. vs. Addressing Typewriter Stencil Corporation,* 31 F. (2d) 282:

> [31 F. (2d) 282] "The order was drawn in entire disregard of equity rule 71, which forbids any recital, except that which comes to us from the English rules of 1824. Instead of this, the solicitor filled up nearly four printed pages with mention of the

affidavits used on the motion, and a page and a half more with what he chose to call 'findings'—*an especial barbarism in an order pendente lite.*" (Italics ours.)

The decision of this court in *Ohio Oil Company vs. Conway,* 279 U. S. 813 (815) indicates that when questions of fact "can not be satisfactorily resolved upon the present affidavits and yet must be resolved" to determine constitutionality, and there is a situation presenting irreparable damage to one of the parties, an interlocutory injunction should be entered. What findings can be expected when "facts can not be satisfactorily resolved"?

In *Smith vs. Illinois Bell Telephone Company,* 269 U. S. 531, the interlocutory decree of the three-judge court was affirmed without opinion upon authority of *Chicago Great Western Ry. Co. vs. Kendall,* 266 U. S. 94 (100). That case preceded the adoption of Equity Rule 70½ but is nevertheless in point to demonstrate the difficulty which would result from applying the rule. In that case the interlocutory decree contained the following language:

> "* * * and said affidavits being conflicting, and the court being of the opinion, from all the facts before the court that a preliminary injunction should issue because the rates are confiscatory, and that the whole matter should go to a final hearing upon the merits upon evidence to be adduced before the court and not merely upon affidavits; that it is therefore best to have the matter disposed of at the final hearing of the cause upon the merits, * * *." (Page 163 of Record in *Smith vs. Illinois Bell Telephone Co.,* No. 90, October Term 1930, 282 U. S. 133).

The reply brief on behalf of the City of Chicago, at page 4, in the same case, 269 U. S. 531, shows that the argument for findings which is presented in the case at bar was presented in that case. There the counsel said:

> "* * * They postponed 'the whole matter' for determination by a single judge at the final hearing, and did not attempt to determine, even in their own minds, any of the '*merits*' involved in the application. * * *"

Nevertheless, this court affirmed (269 U. S. 531).

The appellants (Brief, p. 9) state that in the case at bar "The printed record is 640 pages long, packed almost solid with pleadings and affidavits." They point out that the answer contains specific answer to every allegation of the complaint. In their brief in opposition to Motion to Affirm, at page 15, they claim that every principal point of complainant's case was specifically at issue. The mere fact that every point is at issue and that the record is packed with pleadings and affidavits is sufficient, not only to show that the trial court wisely issued the injunction, but also to show that an attempt to make findings of fact under such circumstances would have been meaningless and unnecessary.

In many states there are statutes that are the equivalent of Equity Rule 70½. Probably, if not demonstrably, the several statutory provisions are derived from the Field Code (New York Code of Procedure by David Dudley Field). The equity rules are stated to be derived from the same source. (1 *Foster Federal Practice*, § 84, p. 579). We are informed that in the New York state courts, a practice of entering findings on interlocutory injunctions is unknown.

In an examination of the decisions of state courts on the question, no decisions have been found which require findings on interlocutory injunctions or other interlocutory orders; and state courts of final jurisdiction have held such findings unnecessary or improper on interlocutory orders in the following cases:

In re Estate of Gibbs, 4 Utah 97, 6 Pac. 525.

Starr vs. Swain, 182 Ind. 313, 106 N. E. 357.

Minneapolis Tr. Co. vs. Menage, 86 Minn. 1, 90 N. W. 3.

Barbaras vs. Barbaras, 88 Minn. 105, 92 N. W. 522.

We turn now to the authorities cited by appellants in support of their assertion that findings should have been made under Equity Rule 70½ or "even in the absence of a rule" (Appellants' Brief p. 9). In addition to texts, to which we shall presently advert, there are thirty-one cases cited to this point in the pages of appellants' brief which are devoted to the question (pp. 5 to 13, incl.). Of these cases, all but four involve a final decision of the court. Some antedated the adoption of the rule. These twenty-seven cases may be simply disposed of on the obvious ground that the rule applies in "deciding suits in equity" and a final decree, of course, requires application of the rule.

It is to be noted, however, that in the case at bar, there is no nullification of the action of the legislature or of its executive officials as was the case in one of the cases quoted in appellants' brief (p. 10). Here the court merely suspended the action pending inquiry, with full protection for telephone users if the Commission's Order were ultimately sustained.

The remaining four embraced interlocutory injunctions, but of these *Graniteville Manufacturing Co. vs. Query,* 44 F. (2d) 64, and *Traitel Marble Co. vs. Manhattan Terrazzo*

Brass Strip Co., Inc., 56 F. (2d) 1039, while in form interlocutory, were respectively based on an undisputed fact situation or followed a final hearing of the particular question disposed of in the decree. The remaining two cases are the only ones in the entire list which are in point. These are: *Indianapolis Water Co. vs. McCardle*, U. S. D. C. Southern District of Indiana, July 21, 1932, Equity No. 1403, and *Indiana General Service Co. vs. McCardle*, 1 F. Supp. 113. They merely evidence the fact that in two cases the trial courts chose to enter findings of fact under Equity Rule 70½. What the findings were and how they were qualified so as to permit corrected findings upon the trial of the issues thus found does not appear.

Counsel cite and quote from *Nichols, Cyclopedia of Federal Procedure* and *Hughes, Federal Practice* (Appellants' Brief pp. 6, 7, 8). The quotations from these works and the sections cited do no more than paraphrase Rule 70½ and do not discuss the applicability of the rule to interlocutory injunctions. However, in the same *Cyclopedia of Federal Procedure*, the Cumulative Supplement (both for 1930 and 1932) at Section 1012 presents the following conclusions:

> "* * * New Equity Rule 70½ does not seem to be applicable to interlocutory injunctional decrees, if to any interlocutory decrees, for several reasons, among which are: The new rule plainly looks towards an appeal by providing special findings and conclusions with a record of them, and as to unappealable interlocutory orders or decrees no purpose would appear to be served by special findings on the decision of them. Again, as to preliminary injunctions, the statutes require certain specifications which will appear in the record (28 U. S. C. A. 383, discussed Cyc. Fed. Proc. §3267, and same in this supplement), which makes such application to them

seem unnecessary. As to appealable interlocutory receivership orders opinion cannot be ventured; but it is worthy of question whether they are 'decisions' of a suit in equity, and it is to be noted that the prompt decision of applications for receiverships, and many of the appealable receivership orders, would be hindered by the preparation of special findings and conclusions, and an appeal perhaps not always facilitated by them."

It is thus apparent that the author of this work has reached a diametrically opposite conclusion from that which counsel attribute to him.

Hughes, Federal Practice does not discuss the question as to the applicability of the rule to interlocutory injunctions. *Frankfurter and Landis,* 45 Harvard Law Review, 271, at 299 and 300, do no more than commend the rule on the requirement for findings. There is no mention of interlocutory orders or injunctions.

It is submitted that requirement for findings of fact and conclusions of law on an interlocutory injunction which merely preserves the *status quo* pending trial of the issues would, in the words of the Circuit Court of Appeals for the Second Circuit, be a barbarism. *(Elliott Addressing Machine Co. et al. vs. Addressing Typewriter Stencil Corporation,* 31 F. (2d) 282.

Further, the mere fact that the trial court had failed to comply with a requirement as to findings would not make the decree reversible. That principle has been applied even to the statutory requirement as to recitals in an injunction.

Arkansas R. R. Comm. vs. C. R. I. & P. R. R. Co., 274 U. S. 597, 598.

B.

There was no abuse of discretion by the court below nor lack of adequate hearing and full deliberation; the hearing was ample.

Procedure of the Trial Court.

Appellants base their appeal principally upon the fact that the trial court required only one day's hearing in order to determine the necessity for an interlocutory injunction. They elaborate upon the size of the record, not only that which had been built up before the court in affidavit form, but also the records of the Commission contained in two boxes whose dimensions are stated in inches, which they had carried into the court room but did not place before the court (Appellants' Brief p. 14, referring to Appellants' Brief in Opposition to Motion to Affirm, p. 16).

The mere statement of the size of the record, together with the conflicts of law and facts which were presented to the court, is enough to show that the court wisely exercised its discretion in issuing the injunction and postponing the analysis of these records until it could be done adequately at the trial.

Appellants bring in the voluminousness of the record before the Commission with an implication that the Commission record was made in preparing the Order which was enjoined. The Commission record was made in a statewide investigation of all the rates and practices of the appellee which had been in progress for nearly a year when the Order was issued and which is still in progress and was expected to last at least a year from the time of the issuance of the Order (R. 262, 264, 466). All of the record had been made by the Commission itself with its own witnesses. The Commission had not started to hear from the appellee in the proceedings (R. 390 to 393). The Order which was en-

joined was issued as an incident of the said proceedings without notice to the appellee (R. 393). It is misleading to present the voluminousness of the record before the Commission as if it had been made solely to produce the Order in question. Its very bulk emphasizes the impropriety of the Commission making its Order without giving the appellee any opportunity to present evidence or argue the questions of fact and law.

We hesitate to discuss matters outside of the record. If the appellants desired to review the method of procedure of the trial court, they should have made it part of the record by appropriate action. However, we feel we must say that we take sharp issue with the appellants' position and maintain the hearing was ample to make certain that there was an apparent case of confiscation and that an injunction should issue. That is clear from the facts and issues outlined in our "Statement of the Case" (*supra* pp. 3 to 9), and our demonstration that confiscation was shown on the face of the Order in Section II of this brief (*supra* pp. 23 to 29).

The Commission's Order *on its face* deprived the appellee of any compensation for terminal toll service; it dealt with the service at 96 telephone exchanges as a single unit, without including the service on the toll lines that connected these exchanges; it computed an exchange rate to figure 6% return on common stock allocated to local service, and its figures showed these rates would reduce the return on all the appellee's capital stock to less than 5% and to less than 4% if the return were based on the common stock equity. *It expressly disclaimed any attempt to make any valuation of the appellee's property.*

Was it the duty of the trial court on preliminary hearing to determine definitively the points now suggested by counsel as required of the court (Appellants' Brief, p. 20)

as to actual return, rate of return and value, when the Commission had made no findings on these questions?

Counsel say in their brief: "We did not get a square deal in the United States District Court, to speak bluntly" (Appellants' Brief, p. 14). Appellee was before the trial court complaining that it did not get a "square deal" from the Commission; that it was not a square deal to issue an order, without notice and without hearing, which reduced appellee's total income by fifty-four per cent. This arbitrary conduct of the Commission was in itself lack of due process.

Northern Pac. Ry. Co. vs. Dept. of Public Works,
268 U. S. 39, 45.

We do not propose to follow counsel into a discussion of personal recollections of what was said by the trial court, nor even to supply from recollection the context of the colloquy from which partial quotations have been taken. We do not think it is proper for us to offer this court counter-affidavits to counsel's proffered affidavits (Appellants' Brief in Opposition to Motion to Affirm, p. 18) as to whether the trial court "thumbed the pages" or "flicked the pages" of the record (Appellants' Brief in Opposition to Motion to Affirm, pp. 15 and 16). We do not propose to discuss the train schedule at Madison (Appellants' Brief, p. 15) in order to ascertain when the members of the court arrived in the city and when they departed. We do not join in conjectures as to what the members of the trial court considered in recess, in chambers, at luncheon or otherwise (Statement as to Jurisdiction, p. 14).

In a hearing which commenced at 10 A. M., and terminated shortly after 3 P. M., with only the recesses which are normal in every trial court, there was ample time for the court to ascertain from counsel, as it did, that a prima facie case of confiscation and unconstitutionality had been made out and that irreparable damage would fall upon the

appellee in the absence of an interlocutory injunction. This was sufficient so that the court unanimously and properly exercised its discretion promptly.

Application for Modification of the Order Was Made to Commission and Denied. Its Effect on This Proceeding Was a Matter for Trial Court's Discretion.

Appellants argue that the Commission's Order included provision for modification upon application by the appellee and that it did not so apply (Appellants' Brief pp. 21 and 22). There could not be a more complete and bona fide application for modification than is contained in the application for rehearing which is printed in full in the record (R. 213 to 240).

Appellants now disclaim a position that the modification provision in the enjoined Order is a bar to federal jurisdiction (Appellants' Brief p. 22). They say that the court should have noted it in exercising its discretion. That is a simple question for the discretion of the lower court. Aside from the fact that suggested modification by the Commission is not a proper relief from confiscation (*Monroe Gaslight & Fuel Co. vs. Michigan P. U. Comm.*, 292 F. 139; *supra* p. 26), it certainly was a matter for the discretion of the court which, in view of the denial by the Commission of the application for rehearing, was properly exercised. This point illustrates the difference between the exercise of discretion and the abuse of discretion.

The Injunction Was no More of "Permanent" Effect Than Any Other Interlocutory Injunction.

Appellants make the argument that discretion was abused, in that the Order of the Commission, being effective for only one year by its terms, the interlocutory injunction was in fact a final injunction (Appellants' Brief

p. 15). They assert that the permanent injunction will not be reached until after the Order has expired. In connection with this argument, no mention whatever is made of the court's requirement of a bond covering refunds to subscribers if the Order be held valid ultimately, and in this respect the argument is misleading. It makes no difference in substance whether the Commission's ordered rate reduction expires before the final decree is reached. The final decree will determine whether or not the Commission's Order was valid during its period of prescribed effectiveness. If determined valid after it has expired, refunds will be ordered and paid under the bond. If the Order is found invalid, the final decree will so declare it as of the effective date of the order and it will be as if the Order were permanently enjoined at the outset. The achievement of such a result is the proper office of an interlocutory injunction and such injunction in this case has no more the effect of a permanent injunction than in any other case.

Remedy on the injunction bond can be granted by the trial court in the principal case if the final decision on the merits is adverse to the appellee.

Russell vs. Farley, 105 U. S. 433, 442, 445.

Pease vs. Rathbun-Jones Eng. Co., 243 U. S. 273, 279.

C.

Express reservation to the Commission later to make the rate reduction herein enjoined as a permanent order was not required.

Appellants complain that, as they interpret the interlocutory decree, if possessed of a record at the end of the Commission proceeding and after the expiration of the en-

joined Order, which record "indisputably calls for a 12½% rate reduction by a permanent order," their right to issue such Order has not been reserved (Appellants' Brief pp. 16 to 18).

It is submitted that this argument is unsubstantial and not deserving of the serious consideration of this court. The decree directs the injunction of the appellants from attempting to compel the appellee, its agents, etc., "to observe or put in force *the rates for telephone service prescribed by the order of the defendant Public Service Commission,*" etc., [designating the Order in controversy] or to comply with said Order, and also the injunction of the appellants, etc., from attempting to enforce any penalties or other remedies "for disregarding *the rates prescribed by said order*" or failure to comply with said Order (R. 630). *The rates prescribed by said Order* are rates to "be effective for a period of one year unless the Commission shall in the meantime alter or amend this order" (R. 205). Consequently, the rates which appellants are enjoined from enforcing are rates *for this period* of one year, the life of the Order.

It is a strained construction by the appellants, against themselves, to claim that they are enjoined from lawfully prescribing rates after the period has expired for which the rates are prescribed in the Order. If the appellant Commission is fearful that the Order might be construed as it suggests, it is at least proper that the trial court should be asked whether it interprets its decree to produce the absurd result suggested by the appellants; and, if so, the trial court should have an opportunity to hear argument and to pass upon the soundness of such result. The appellants have not asked the trial court to do this.

An interlocutory injunction is subject at all times to control of the court granting it, and to dissolution as well as modification by that court.

Barnard vs. Gibson, 7 How. 650, 658.
Buffington vs. Harvey, 95 U. S. 99, 100.
Russell vs. Farley, 105 U. S. 433, 441.
Westerly Waterworks vs. Town of Westerly, 77 Fed. 783, 784.
In re Arkansas Railroad Rates, 168 Fed. 720, 722.
Twenty-one Mining Co. vs. Original Sixteen to One Mine, Inc., 240 Fed. 106, 110.
In re Jackson, 9 Fed. 493, 495.

D.

The appellants' assertion that the court abused its discretion in holding the rates confiscatory is inconsistent with their other argument as well as unfounded.

The appellants argue (Appellants' Br. pp. 18 to 21) that the court abused its discretion in holding the enjoined rates to be confiscatory. This is hardly consistent with their argument that they had no means of proving that the law was misapplied or whether the court granted the injunction on unsound grounds or upon no grounds at all (Appellants' Brief in Opposition to Motion to Affirm, pp. 16 and 17).

Elsewhere in this brief we have shown that confiscation existed on the face of the Order (Section II of this Brief *supra* pp. 23 to 29) and that independently of this a case of confiscation had been made out on the pleadings and affidavits (Section IV A and B of this Brief, *infra* pp. 45 to 49). Moreover, the court ascertained that the Commission had disclaimed the duty of making any finding on valuation of property or a fair rate of return thereon (R. 143, 189); this nullified any prima facie validity which might attach

to the order and shifted the burden of answering the complaint and appellee's affidavits which made out a case of confiscation.

St. Louis & O'Fallon Ry. Co. vs. United States, 279 U. S. 461, 487.

C. M. & St. P. Ry. Co. vs. Public Utilities Comm., 274 U. S. 344, 352.

Northern Pac. Ry. Co. vs. Dept. of Public Works, 268 U. S. 39, 45.

These things placed the court where the refusal of an injunction would have abused its discretion.

IV.

The Merits of the Case Below Disclose a Situation Where Judicial Discretion Was Required and Exercised, Not Abused.

It is fully recognized that this appeal is not concerned with the merits of the case even as they were developed in the pleadings and the affidavits in the trial court, except as these merits are necessary to a determination of *whether or not* the trial court exercised its judicial discretion. It is understood that this court will not undertake to determine whether, were it in the place of the trial court, it would have exercised its discretion in the same way and with the same result, although in the case at bar discretion could hardly have been exercised otherwise. For these reasons, it is only necessary to review the merits, as they existed in the pleadings and affidavits, to the extent needed to demonstrate that the facts before the trial court were sufficient not only to permit but to require the application of judicial discretion.

Having in mind this proper limitation of a discussion of the merits and also the fact that in the several sections

of this brief there has necessarily been some discussion of the facts before the court, it is proper to add only a brief summarization of the facts which required the exercise of the trial court's discretion.

In this connection the attention of the court is invited to the brief which was before the trial court and which was here printed as an appendix to the Motion to Affirm (Motion to Affirm, pp. 17 to 61).

A.

Unless the lower court disregarded all of appellee's affidavits, it could not fail to find confiscation, as every reasonable allocation of property and method of valuation indicated a return of less than 4-1/2%.

It is an important fact that the Commission in its Order disclaimed making a finding on valuation of appellee's property or of a fair rate of return thereon. In the answer and the affidavits in support thereof allegations were made by the appellants as to the value of the appellee's property, used and useful for the rendition of its local telephone service. The appellants denied knowledge of the fair value of the plants and equipment devoted to intrastate use.

The data placed before the court by appellee's affidavits and particularly the investment, fair value of the property, the net income and the rate of return on each relevant classification of service have been described in the statement of the case (*supra* pp. 13 and 14). These data were presented for the year 1931 and for the first six months of 1932 (R. 319, 320, 248, 345, 252, 521, 518). All of these valuations and computations are summarized in the table printed on the next two pages. This table was contained in appellee's brief in the trial court which is printed in full here as an appendix to the Motion to Affirm (Motion to Affirm, pp. 19 to 61).

Computations of Rates of Return.

For the Year 1931

	Property (Average)	Present Rates		Proposed Rates	
		Net income	Rate of Return	Net income	Rate of return
Interstate and Intrastate:					
Entire telephone service:					
Investment	81,135,066*	2,891,481	3.0%	1,663,583*	2.1%
Fair value	76,066,979*	2,891,481	3.9%	1,663,583*	2.2%
Entire exchange service:					
Investment	59,863,570*	2,331,571	3.9%	1,053,955*	1.8%
Fair value	55,895,026*	2,331,571	4.2%	1,053,955*	1.9%
Entire local service (with actual expenses):					
Investment	54,251,434	2,265,740	4.176%	1,025,006	1.889%
Fair value	50,755,065	2,265,740	4.464%	1,025,006	2.02%
Intrastate:					
Intrastate telephone service:					
Investment	73,588,891	2,582,110	3.51%	1,319,874	1.95%
Fair value	68,757,563	2,582,110	3.76%	1,319,874	2.08%
Intrastate exchange service:					
Investment	58,210,268	2,301,679	3.95%	1,035,000	1.73%
Fair value	54,202,856	2,301,679	4.25%	1,035,000	1.86%
Intrastate local service (with actual expenses):					
Investment	54,051,971	2,250,261	4.163%	1,011,145	1.871%
Fair value	50,503,299	2,250,261	4.450%	1,011,145	2.002%

* Subject to trifling correction—See R. pp. 303-4; 330 (Complainant's affidavits).

Computations of Rates of Return.

For the First Six Months of 1932

	Property (Average)	Present Rates		Proposed Rates	
		Net income	Rate of return	Net income	Rate of return
Interstate and Intrastate:					
Entire telephone service:			(Annual basis)		(Annual basis)
Investment	84,292,841	1,226,494	2.91%	606,327	1.44%
Fair value	78,604,828	1,226,494	3.12%	606,327	1.54%
Entire exchange service:					
Investment	62,090,824	1,137,451	3.66%	500,198	1.61%
Fair value	57,572,812	1,137,451	3.95%	500,198	1.74%
Entire local service (with actual expenses):					
Investment	56,290,097	1,125,559	3.999%	513,705	1.825%
Fair value	52,491,687	1,125,559	4.289%	513,705	1.957%
Intrastate:					
Intrastate telephone service:					
Investment	76,584,685	1,169,886	3.06%	546,550	1.43%
Fair value	71,381,459	1,169,886	3.28%	546,550	1.53%
Intrastate exchange service:					
Investment	60,327,134	1,127,201	3.74%	490,553	1.63%
Fair value	55,957,759	1,127,201	4.03%	490,553	1.75%
Intrastate local service (with actual expenses):					
Investment	56,033,858	1,117,948	3.99%	506,708	1.809%
Fair value	52,252,773	1,117,948	4.279%	506,708	1.939%

While as stated appellants denied knowledge of the statements relative to intrastate property and service, they took issue in their answer and affidavits with the other statements and computations.

The principles of valuation and the methods used in determining inventory quantities, the fair value and investment, the allocation of revenues and expenses, and the presently existing or observed depreciation were thoroughly presented in appellee's affidavits (R. 246 to 253, 290 to 357, 394 to 400, 405 to 414, 501 to 536, 577, 578, 584 to 603). With rates of return not exceeding 4½% under existing telephone rates and not exceeding 2.2% under the proposed rates, can it be said that the trial court abused its discretion in finding prima facie confiscation under the enjoined order?

B.

The failure of the appellant Commission to make any finding on value of property and the impropriety of its method of determining fair return based upon the par value of a portion of the common stock justify the exercise of discretion in granting the injunction.

At page 20 of Appellant's Brief, there is quoted from the Commission's Order a part of what the Commission chose to say under the heading "fair return" (R. 189). On the same page of the Order the following is also pertinent:

> "*Having made no finding of fair value we have, of course, made no finding as to what percentage return upon fair value the rates ordered will produce,* and such a determination we believe unnecessary for the purposes of this interlocutory order. The rates fixed will produce sufficient revenue to permit of a

> return which is fair to the Company. Neither our statutes nor the state or federal constitution require that any particular procedure shall be followed so long as the net result is reasonable and does not deprive the utility of its property without due process of law." (R. 189.) (Italics ours.)

Neither below nor here nor in the Order is any authority invoked for this very original doctrine that a return of 6% on a part of the par value of the common stock has anything whatever to do with "fair return."

It is to be noted that the Commission did not attempt to provide 6% on the par value of all of the common stock of the appellee but only 6% on a part of the stock, which part the Commission itself allocated to the *local* service (not exchange service) by its own methods (R. 145). Deferring for a moment a discussion of the method used in this subdivision of the stock and appellee's contention that there was not even a return of 6% on the par value of the common stock, let alone common stock equity, the impropriety of the Commission's method of determining fair return left the court with no alternative but to grant the injunction pending examination of this new departure from the tenets of rate making.

C.

The disregard by the Commission of the unity of appellee's system and the admitted deprivation of all compensation for terminal toll services justify the exercise of discretion in granting the injunction.

In the process of dividing the common stock, it was assigned by the Commission in part to the so-called "exchange" service and to toll service. This division was not made, however, according to the respective services as

they existed at the time and had existed for many years and had been used in making all of appellee's existing rates, with the expressed approval and even command of the said Commission under its former name of Railroad Commission (R. 358 to 390, 255). Exchange service, as it existed and as its rates were designed, included the service of handling toll messages from the toll switchboard to the subscriber station, called terminal toll service; and the toll service, as it existed and had been used in making rates, did not include that service. The Commission, however, concededly transferred to the toll service the expenses and the proportion of capital stock attributable to terminal toll service, but transferred nothing from exchange revenues to cover this new division (R. 278); and on the face of the Order showed that the result would produce a return on the part of the stock allocated to toll service of less than one-third of the Commission's own 6% allowance (See computation *supra* p. 8). The Commission's Order further left in effect the requirement that the appellee furnish this terminal toll service as part of its exchange service, although the Order based the rates for exchange service only on the capital stock and operating expenses allocated to *local* service and exclusive of the property or capital stock and expenses allocated to the terminal toll service.

As to this, the Commission said in its Order:

"Our order does not pass upon toll rates, and we therefore are making no finding respecting the reasonableness or unreasonableness of the return produced by existing rates on that separate class of business. If existing intra-state rates thereon, in the judgment of the Company, are inadequate, they have a remedy before this Commission." (R. 189.)

In its answer, the Commission said as to this:

"* * * Defendants admit that the Commission's order provides no payment to said complainant for

> return on property located in its exchanges involved in furnishing toll service but deny that such property is capital of the *exchange* telephone business and defendants allege that such property is not property used and useful in rendering *exchange* telephone service. Defendants allege that, for any return on such capital and property, not covered by the toll rates of the Company, said Company has its remedy to establish toll rates which will cover such return and to apply to the Commission for such toll rates in any cases where said Commission has jurisdiction. * * *'' (Italics ours.) (R. 274.)

The Commission's Order, however, did not relieve the appellee from the duty under the Commission's previous orders of furnishing toll terminal service as part of the exchange service (R. 367, 368 et seq.).

The Order was issued in the course of a proceeding denominated a "state-wide investigation." Nothing in the Order establishing such proceeding indicated that it related to exchange business any more than to toll business (R. 17 to 37). Appellee's ninety-six exchanges are interconnected by its toll system. The rates for exchange service in each of the ninety-six communities have been separately established (R. 358 to 365). The reduction in rates was ordered uniformly for the ninety-six exchanges of the appellee without any regard to the respective conditions in the said ninety-six communities and with an expressed disregard of the conditions imposed by the Order itself upon the toll system, which toll system is the only connecting link among the exchanges.

A telephone company's franchise in Wisconsin is one state-wide, granted under general statute, comprehending toll as well as exchange service; and the unity of its character is shown by the fact that it is classified with

franchises of telegraph companies and transmission companies and is not a subject for local grant.

Wisconsin Stats., §180.17 (See Appendix).

Kenosha vs. Kenosha Home Telephone Co., 149 Wis. 338.

This franchise situation makes all the more applicable to the case at bar the rule stated by this court in *Wabash Valley Electric Co. vs. Young*, ... U. S. ....., 53 Sup. Ct. Rep. 234, 236, that:

> "Normally, the unit for rate-making purposes, we may assume, would be the entire inter-connected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions."

This disregard of the unity of appellee's system, together with admitted deprivation of a fair rate, according to the Commission's own standard on the toll system, of which it had substantial jurisdiction (less than 30% of appellee's operating toll revenue was interstate in the first six months of 1932 (R. 340)) also fully warranted the discretionary issue of the injunction.

Taking the Commission's theory of return on the capital stock, we find the Commission's Order itself shows that on the Commission's own figures, the rates prescribed would reduce the return on the whole of appellee's capital stock to 4.85% per annum and on its capital stock equity to 3.95% (See computation at p. 8 *supra*).

D.

The obvious lack of due process of law in the procedure before the Commission preliminary to and in connection with the issue of the Order justify the exercise of discretion in granting the injunction.

The appellee alleged an absence of due process of law in the proceeding which had antedated the issue of the Order (R. 13, 14). The Order was entered without any notice that it was even under consideration by the Commission in the course of the proceedings which were far from half completed (R. 390, 393). Further, the Commission had not closed the presentation of its own case. Thus, besides lack of notice of consideration of the Order, the appellee had no opportunity for presentation of evidence or hearing in the proceeding before the Commission, excepting for a limited amount of cross examination of certain of the Commission's witnesses (R. 390 to 393). The Commission had acted as prosecutor and protagonist and not quasi judicially; the Commission had denied the appellee's requested access to statements prepared for publication in advance of the hearings by members of the Commission staff with its knowledge and approval, summarizing in advance the exhibits and testimony of prospective witnesses as if given, which appellee required for cross examination and proper presentation of its case.

These allegations supported by affidavits presented a serious question as to whether appellee had had due process of law before the appellant Commission.

Interstate Commerce Comm. vs. Louisville & Nashville Railroad Co., 227 U. S. 88, (93).

In re Rosser, 101 Fed. 562, (567).

Road Improvement Dist. No. 2 vs. Missouri Pac. R. Co., 275 Fed. 600 (604).

Mercantile Trust Co. vs. Texas & P. Ry., 51 Fed. 529 (542).

Wichita R. & L. vs. Public Utilities Com., 260 U. S. 548.

Northern Pac. Ry. Co. vs. Dept. of Public Works, 268 U. S. 39 (45).

These charges against the Commission not only negative any presumption that there might otherwise have been in favor of the Commission's Order (*Public Service Gas Co. vs. Commrs.*, 87 Atl. 651 (653)) but also presented an additional situation which required that appellee be given the protection of the federal court pending inquiry and testimony in the matter.

E.

The temporary or alleged emergency character of the order did not prevent the exercise of discretion to grant the injunction.

The enjoined Order makes its rate cuts effective for only one year and in that respect may be deemed temporary.

Constitutional guaranties are not abrogated merely because an order is effective for a given period of time. The appellants throw weight on the provision of the Order that permits an application to the Commission for a change of the Order. A rate is not permitted to be confiscatory merely because experimental.

Northern Pac. Ry. Co. vs. Dept. of Public Works, 268 U. S. 39 (41).

Prendergast vs. New York Tel. Co., 262 U. S. 43 (49).

Indiana General Service Co. vs. McCardle, 1 F. Supp. 113.

As a matter of fact, the appellee made application for rehearing which is the statutory method of applying to the Commission for a change in an order which it has issued (Wis. Stats. Sec. 196.405). The application was denied (R. 266).

The Commission also denominated the Order to be an "emergency order," issued as such. The appellee alleged in its application for rehearing before the Commission and in the court below that no emergency in fact existed; that the welfare of the people was not seriously threatened by the size of the telephone rates, that the fact that telephone rates were not an unwarranted burden on the public, was shown by the fact that the loss of subscribers, as measured by the loss of stations, from the peak on May 31, 1931, to June 30, 1932, was only 5.15% (R. 538). This loss is insignificant compared to most businesses. The reduction of rates ordered by the Commission would amount to less than one cent a day for over half of appellee's residence subscribers, and less than two cents a day for 97.8% of such subscribers; and less than three cents a day for 84.7% of the business subscribers. Taking all of appellee's subscribers together, 89.2% would receive a reduction of less than two cents per day, and 96.7% a reduction of less than three cents a day, by making effective the Commission's Order (R. 360). Under these circumstances, it is not surprising that the trial court was unimpressed by the attempt to justify the Order on the grounds of emergency.

F.

The record on the proposed adjustment and disallowance of expenses by the Commission justifies the injunction pending investigation.

Most of the discussion in this brief regarding the net income of the appellee and particularly the showing of invalidity on the face of the Order in several respects, has been based upon the appellee's net income as found by the Commission in its Order. However, to reach this net income, the Commission made so-called adjustments or exclusions from the expenses of the appellee in five respects, being (1) maintenance, (2) depreciation, (3) relief department and pensions, (4) license fee, and (5) amortization of intangible capital, resulting for 1931 in disallowance of expenses to the amount of $1,042,772 (R. 122). The last item "amortization of intangible capital" amounted to $19,746 and was disallowed not because it was improper, but because in a study of future income it was nonrecurring (R. 112). This is the only item of the five adjustments which the appellee did not vigorously contest (R. 330, 333, 230, 231, 253, 249). By this adjustment the Commission found an increase of the appellee's book net income for 1931 from $2,891,481 to $4,060,478 (R. 141). Without these adjustments the whole basis of the Commission's own theory of rate reduction would have fallen. In view of the fact that these adjustments were sharply at issue and were so material, they were sufficient in themselves to demonstrate to the trial court that there would be no abuse of discretion in issuing the interlocutory injunction pending ascertainment of the facts.

CONCLUSION.

Irrespective of the fact that the affidavits showed practically conclusively confiscation of the appellee's property based on fair valuation thereof, the undisputed fact that appellee would be subjected to irreparable loss, should the injunction not be issued and the Order ultimately be held invalid, coupled with the fact that the appellants and the telephone subscribers would be protected by bond against any loss, together with at least probable violation of constitutional guaranties by the Commission's Order, presented a situation to the trial court where the interlocutory injunction was absolutely required as granted.

It is respectfully submitted that the decree for interlocutory injunction appealed from, should be affirmed.

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APPENDIX.

28 U. S. C. §383.

Same [injunctions]; requisites of order; binding effect. Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same. (Oct. 15, 1914, c. 323, §19, 38 Stat. 738.)

Wis. Stats. Sec. 180.17. Transmission Lines: Privileges: Damages.

(1) **Right of way for.** Any domestic corporation organized to furnish telegraph, telephone, service or transmit heat, power or electric current to the public or for public purposes, may, subject to reasonable regulations made by any city or village through which its transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge or any stream or body of water, or upon any lands of any owner consenting thereto, and for such purposes may acquire

lands or the necessary easements; and may connect and operate its lines or system with other lines or systems devoted to like business, within or without this state, and charge reasonable rates for the transmission and delivery of messages or the furnishing of heat, power or electric light.

* * *

(7) **Municipal franchise required.** No lighting or heating corporation shall have any right hereunder in any city or village until it has obtained a franchise from such city or village.